No. 2712.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL OESTING, alias Paul Allen,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

PETITION OF PLAINTIFF IN ERROR FOR A REHEARING

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Filed this.....day of August, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals, for the Ninth Circuit:

The plaintiff in error respectfully asks the Court to grant a rehearing of this cause upon the grounds hereinafter stated.

THE JUDGMENT OF DISTRICT COURT SHOULD HAVE BEEN REVERSED.

The judgment of the District Court should have been reversed for the reasons:—

1. That the indictment is lacking in one or more essential elements to constitute the offense attempted to be charged.

2. That, more particularly, the indictment does not set forth "a scheme reasonably calculated to deceive persons of ordinary comprehension and prudence."

3. The indictment does not set forth the particulars of the alleged scheme to defraud sufficiently to advise the defendant that he is charged with the commission of a crime.

4. The alleged "scheme to defraud" as set forth in the indictment in itself negatives the allegation that it is intended to defraud.

THE LAW.

The law applicable to this case, as found by this Court on the appeal is as follows:—

> 1. " . . . The section does not require that the scheme be fraudulent on its face. . . . . All that is required is that it be a scheme reasonably calculated to deceive persons of ordinary comprehension and prudence and that the mail service of the United States be used and intended to be used in execution of the same."
>
> 2. " . . . by the defendant's failure to demur to an indictment or enter a motion to quash, or a motion in arrest of judgment after verdict, he waives his right to object in an appellate

court to any matter which goes to the form in which the offense is stated, but he does not waive the right to raise the objection that the indictment is lacking in some essential element to constitute the offense which is charged."

THE FACTS.

We disagree somewhat with the statement of facts accompanying the opinion of the Circuit Court and believe that it is our failure to properly emphasize that there is an erroneous statement of them in the brief for the people that has led to this misunderstanding.

The facts are, briefly, that a certain doctor named Oesting intended to correspond, under an assumed name, with various persons, making use of the United States Post Office. He was to state to them that he was a doctor skilled in the treatment of private diseases of men and to induce them, by letters and advertisements, to communicate with him relative to their real or supposed ailments, and then, having no *proper* knowledge of their real condition, tell them they were afflicted with diseases which he could cure, and induce them to send money for medicines and treatments for diseases which they had been *so** induced by defendant to believe themselves afflicted with, and send medicine and treatment not properly designed and having no value,* for their cure,* he having no *proper or professional* knowledge of such person's condition

or whether they were diseased or whether such medicine and treatment would benefit them. (The asterisks mark important portions omitted in the statement accompanying the opinion.)

There are various statements in the indictment to the effect that the name assumed by Dr. Oesting was not the name of a doctor or of any real person, and that Dr. Oesting knew this; but these have no bearing on the matter, for it is not a crime to call yourself Smith instead of Brown, as long as there is no Brown, or as long as you are not trading on the name of Brown, who is or has been a man of repute while you are no-one in particular.

The Court has been led into error by a statement that Oesting sent medicines and treatment having little or no value for the cure of afflicted persons, whereas the indictment sets out that the medicines and treatment were *sent* for the cure of such persons; whatever their value, they were intended to cure, it was the wish, the desire, of defendant that they should cure.

The Court has further been led into error by a statement that the defendant was to be sent money for the treatment of diseases which persons "had been induced by the defendant to believe themselves afflicted with." But there is nothing of that sort in the indictment. The indictment says that persons were to be induced to send money for medicines and treatment "for the cure or alleviation of the diseases

with which said persons were afflicted, or had been *so* induced . . . . to believe themselves afflicted." "So induced" must refer to something that was intended to be made a part of the indictment but was left out, for there is no place in the indictment where it is stated that Dr. Oesting induced anyone to believe himself ill; or, if we stretch the word "so" to such an extent as to apply it to everything that precedes it in the indictment, we must, nevertheless, confine ourselves to the facts. Suppose then, these persons were induced to think themselves ill by the doctor's statement that he was skillful and by his diagnoses made without proper knowledge of the person's condition, there is no criminality. He has boosted his wares, called himself an extraordinary doctor, when he was only an ordinary one, claimed a special knowledge, when he knew his knowledge was no greater than that of any other doctor. But boosting your wares is not recognized as a crime. If it were most of us would be in jail.

CERTAIN PRINCIPLES.

In examining the indictment there are certain principles to be recognized, certain inalienable rights of all defendants in criminal cases. These must be used in applying the law to the facts.

The reverence of the American people for Liberty, that greatest of all things in life, is nowhere more

evident than in their care for the rights of those accused of crime. Three times in the Constitution of the United States have they shown their desire to protect the innocent, even though this protection may often result in the escape of those who are guilty.

The Fifth Amendment provides that one can be prosecuted only on presentment or indictment; that he cannot be twice put in jeapordy for the same offense; that he need not be a witness against himself; that he cannot be deprived of liberty without due process of law.

The Sixth Amendment gives him the right of trial by an impartial jury; to be informed of the nature of the accusation against him; to be confronted by the witnesses and to have witnesses in his own behalf.

The Fourteenth Amendment is a repetition of the others, imposing upon the States the obligation of observing carefully the rights of the accused, wherever life or liberty is at stake.

Recognizing this reverence for liberty; this desire to protect the innocent at all costs, even to the advantage of the guilty, the Supreme Court has held that it is not enough that there should be a presentment or indictment, but these must clearly set forth both the crime and the circumstances and exact specifications as to what it consists of, to the end that neither the criminal nor the court which tries

him may be mislead, and that there may be no doubt in case of a second accusation of the same offense.

> " . . . every ingredient of which the offense is composed must be accurately and clearly alleged . . ."
>
> *U. S. vs. Cook*, 17 Wall. 174.
> *U. S. vs. Cruikshank*, 92 U. S. 542.

> "In criminal cases prosecuted under the laws of the United States, the accused has the right "to be informed of the nature and cause of the accusation." Amend. VI. In *United States vs. Mills*. 7 Pet. 142, this is construed to mean, that the indictment must set forth the offense "with clearness and all the necessary certainty to apprise the accused of the crime with which he stands charged.' "

> "For this facts are to be stated, not conclusions of law alone. A crime is made up of fact and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."
>
> *U. S. vs. Cruikshank, supra.*

And in the case of the particular crime with which it is attempted to charge the defendant in this case, particular specification has been required; it is not enough to charge that a scheme has been devised and that it is intended to defraud. The scheme, as stated by this Court, must be one such as can be expected to succeed; to actually defraud; to defraud to the injury of the person defrauded and to the advantage of schemer; it must be "reasonably calculated" to defraud. And this scheme must be so clearly and specifically set out that there can be no

mistake, it must appear in the indictment with full specification.

> "The statute is directed against 'devising, or intending to devise, any scheme or artifice to defraud,' to be effected by communication through the postoffice. As a foundation for the charge, a scheme or artifice to defraud must be stated, which the accused either devised or intended to devise, with all such particulars as are essential to constitute the scheme or artifice, *and to acquaint him with what he must meet on the trial.*"
>
> "Such particulars are matters of *substance* and not of form, and their omission is not aided or cured by verdict."
>
> *U. S. vs. Hess*, 124 U. S. 483.
>
> (The italics are ours.)

CONCLUSION.

Taking the foregoing principles and carefully observing them while applying the law as heretofore stated by this Court on this appeal to the facts set forth in the indictment, can it be held that the District Court was correct in finding that that indictment set out a crime, and set it out with the specification required by the Supreme Court in passing upon the meaning of the Constitution?

A person's good name is an important matter, his liberty means as much as his life; the American People have said this, they have insisted upon it in three distinct amendments to their Constitution.

Trial by jury is an inalienable right. It is a very serious matter to mislead a man by an imperfect indictment and cause him to waive this right. Is he to come in and confess that he has been unethical in his practice as a doctor, that he has claimed to be better than he is, that he has sent medicines not so good as he claimed them to be nor as good as some other specialist might prepare, and be told that he is therefore to be deprived of liberty? Is he to be accused of these things and then be sent to jail for confessing them?

Dr. Oesting schemed to convince people that he was extraordinarily competent, whereas he was but ordinarily so; he schemed to diagnose in accordance with his ability, his knowledge was not "proper or professional," but it was knowledge; he must have had some knowledge, for he was a doctor, and the very use of the term denotes at least some knowledge of medicine; but he did not have a proper amount of knowledge nor the amount he claimed to have. He knew that his medicines were not "*properly* designed or prepared," but he thought they had at least some value for the cure of the persons to whom they were sent, value in proportion to his knowledge, for he sent them to cure, he expected them to cure, slowly perhaps, but finally; they were sent "for the cure" of the persons afflicted.

Sometimes the symptoms communicated to him might indicate health, but he was not to be guided

by these symptoms alone; nowhere in the indictment does it appear that he was to be guided by these alone, and the letters attached do show as a matter of fact that he tried other means to ascertain the condition of his correspondents; he actually made use of urinary analysis, chemical test papers, other data and records, and personal interviews; it does not appear whether or not actual physical examinations were made at his office in San Francisco, but he requested personal interviews, and we assume the physical examinations were made. At any rate he did not confine himself to the symptoms communicated by letter; it might happen that persons were ill, though their own statements of their symptoms indicated health, but the very fact that they should consult a doctor would seem an indication that something was wrong, though not properly expressed in letters. In such case he sought further particulars, physical examination, advice of the family physician, samples of blood and urine, or whatever might seem to him proper. He did not guide himself entirely by the fact that the letters sent through the mail advised him only of symptoms indicating health, he went after the man, and if he was sick, in spite of the mail communications, he sent medicine and treatment for his cure.

To these things Dr. Oesting has confessed; he has not confessed to the commission of a crime.

Dr. Oesting should be allowed to go free; the Con-

stitution demands it, the decisions of the Supreme Court order it.

If the indictment here is to be turned and twisted, words omitted, commas left out or added, then, all this should be done in such a way as to benefit rather than injure the defendant. He could adopt no strained interpretation when he entered his plea of guilty; he could not foresee that words would be given other than the ordinary meaning attached to them by a layman; he read a statement of facts not criminal; he confessed to committing them; the acts may have been wrong, but he knew they were not criminal.

The people's brief on this appeal has turned and twisted acts that at most are wrong and unethical in such a manner as to make it appear to this Court that a crime has been committed. Possibly we may have shaped them in our briefs to suit ourselves. But we are representing a man fighting for liberty; fighting for what means to him perhaps more than life. We have tried to be honest, but may have been influenced more or less by the picture of a good man struggling for his freedom, as the District Attorney has been influenced by a desire to fulfill what he considers the duties of his office. But we ask now that this Court take up the transcript, consider the indictment from its four corners, remembering that this case is one that involves liberty and freedom,

not money or property; and we feel assured that the judgment of the District Court will be reversed.

Respectfully submitted,

HERBERT CHOYNSKI,
JAMES RALEIGH KELLY,
Attorneys for Plaintiff in Error.

CERTIFICATE OF COUNSEL.

I hereby certify that I am one of the attorneys for the plaintiff in error and petitioner in the above entitled matter and that in my judgment the foregoing petition for a rehearing is well founded in point of law and is not interposed for delay.

JAMES RALEIGH KELLY,
Of Counsel for Defendant in Error and Petitioner.